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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PAUL MICHAEL WELCH,

Petitioner,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

E066795

(Super.Ct.No. INF1670177)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. James S. Hawkins
and John G. Evans, Judges. Petition granted.

Christopher Joseph DeSalva for Petitioner.6

No appearance for Respondent.

Michael A. Hestrin, District Attorney, Alan D. Tate, Deputy District Attorney, for
Real Party in Interest.

Having reviewed the petition and deemed it might have merit, we stayed matters in the trial court and requested an informal response from real party in interest, the People. That response concedes the trial court erred in rejecting petitioner's peremptory challenge to a judge as untimely. We agree with petitioner and the People that relief is warranted. Because resolution of the matter involves the application of settled principles of law, and because the equities favor petitioners, issuance of a peremptory writ in the first instance is appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is facing charges of insurance fraud (Pen. Code, § 550, subds. (a)(1), (a)(4), (b)(3)) and attempted grand theft (§§ 666/487). He and his counsel appeared for a preliminary hearing on September 1, 2016, and announced they were ready to proceed. The trial court, the Honorable Judge James Stafford Hawkins presiding, responded with "2F. Forthwith."

Petitioner and his counsel then went to Department 2F and found it locked. A court reporter responded to a knock on the door and indicated the Honorable Judge John G. Evans was the bench officer sitting in department 2F that day.

Petitioner's counsel then returned to Judge Hawkins's courtroom and asked to have the matter recalled. He informed the trial court that "the defense [wa]s challenging the judge." The trial court observed it was difficult to find a courtroom for a three-hour preliminary hearing and asked if counsel had filed his judicial challenge before leaving

for Department 2F. When counsel indicated he could not because had not known which judge was in Department 2F at the time of the assignment, the trial court responded, “It’s too late. You have to do it in Master Calendar before you’re assigned out.”

Petitioner and his counsel then appeared before Judge Evans for the preliminary hearing. Counsel tried to exercise a peremptory challenge to Judge Evans but was told he was untimely because he had not filed it before leaving “the master calendar.” The trial court indicated the only way petitioner could have been “safe procedurally” was to have asked Judge Hawkins who was sitting in Department 2F and then to have exercised a peremptory challenge before leaving.

After denying petitioner’s peremptory challenge as untimely, Judge Evans proceeded to conduct a preliminary hearing. Petitioner was held to answer.

This petition followed on September 13, 2016. On September 15, 2016, we stayed proceedings in the trial court, including the September 16, 2016 arraignment on the information.

DISCUSSION

Code of Civil Procedure section 170.6 governs peremptory challenges to judicial officers. Its rules for when to file a challenge are: “If the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to, or who is scheduled to try, the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least 5 days before that date. If directed to the trial of a cause with a master calendar, the motion shall be made to the

judge supervising the master calendar not later than the time the cause is assigned for trial. If directed to the trial of a criminal cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance. If directed to the trial of a civil cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 15 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 15 days after the appearance.” (Code Civ. Proc., § 170.6, subd. (a)(2).)

In other words, “As a general rule, section 170.6 permits challenge of a judge at any time before commencement of a trial or contested hearing, with three exceptions: (1) the ‘all-purpose assignment’ rule . . .; (2) the ‘master calendar’ rule; and (3) the ‘“(10-day/5-day)” ’ rule.” (*D.M. v. Superior Court* (2011) 196 Cal.App.4th 879, 886, fn. omitted.) A peremptory challenge that is “duly presented” results in the automatic disqualification of the challenged judge. (*Id.* at p. 887.) More specifically, an order holding a defendant to answer after a preliminary hearing that was conducted by a judge who was bound to accept a peremptory challenge prior to that hearing is void, even if “substantial” evidence supports the holding order. (*McCauley v. Superior Court* (1961) 190 Cal.App.2d 562, 565.)

Here, it appears the trial court relied on the master calendar rule when it denied petitioner’s peremptory challenge on the ground that it had not been presented before

petitioner and his counsel left Judge Hawkins's department. That rule, however, applies only to "the *trial* of a cause" and an "assign[ment] for *trial*." (Code Civ. Proc., § 170.6, subd. (a)(2), italics added.) Here, Judge Hawkins assigned petitioner's case to a department not for trial, but for a preliminary hearing. The master calendar rule therefore does not apply. As we agree with petitioner and the People that the all-purpose assignment and 10-day/5-day rules also fail to apply, no authority supports the trial court's refusal to accept petitioner's peremptory challenge to Judge Evans.

Moreover, even if the master calendar rule does apply, an assignment to a department that "fail[s] to state the name of the judge to which the case was assigned" does not require the presentation of a peremptory challenge before the judge's identity is known. (*People v. Bonds* (1988) 200 Cal.App.3d 1018, 1022.) Here, Judge Hawkins assigned petitioner's case not to Judge Evans, but to department 2F. While petitioner's counsel could have asked who was sitting in department 2F, nothing required him to do so. We will not require petitioner to sacrifice the right to challenge Judge Evans on a peremptory basis because his counsel failed to comply with a rule that finds no support in Code of Civil Procedure section 170.6 or the cases applying that statute to an assignment to a department rather than to a judicial officer.

No authority supported the trial court's denial of petitioner's peremptory challenge. Petitioner is therefore entitled to a new preliminary hearing before a judicial officer other than Judge Evans.

DISPOSITION

Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to accept petitioner's September 1, 2016 peremptory challenge to Judge Evans as timely.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.